

FILE COPY

FILED

DEC 16 1946

**CHARLES ELMORE CROPLEY
CLERK**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 789

**VACUUM CAN COMPANY, A CORPORATION,
BURTON O. SMITH,**

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

↓
CHRISTOPHER B. GARNETT,
Counsel for Petitioners.

BARBOUR, GARNETT, PICKETT,

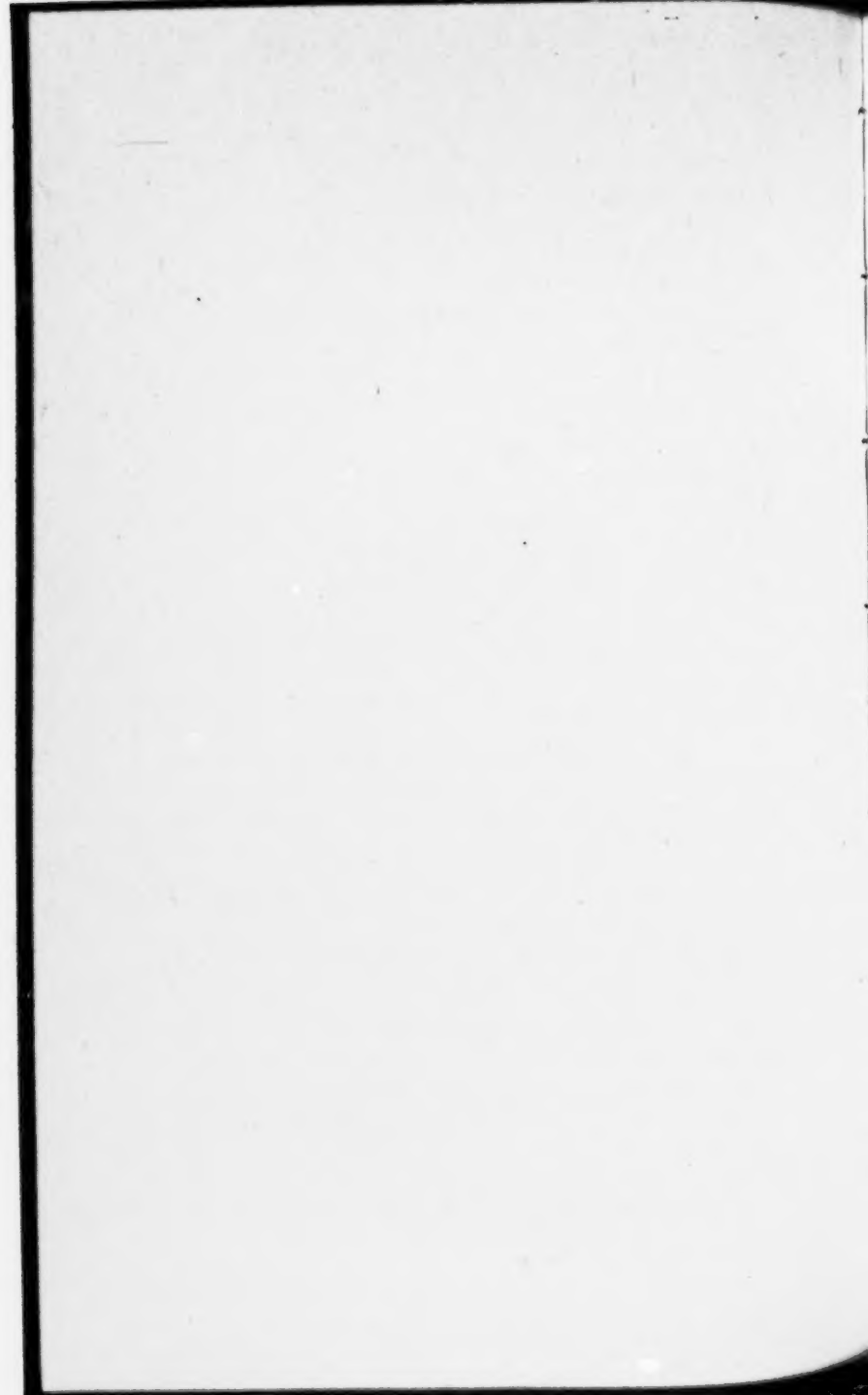
KEITH & GLASSIE,

HENRY H. GLASSIE, JR.,

THOMAS H. RILEY,

EVERETT JENNINGS,

Of Counsel.



INDEX

	Page
Petition for writ of certiorari	1
Summary statement	2
Jurisdiction	6
Questions presented	7
Reasons for granting writ	8
Brief in support of petition	9
The opinions below	9
Statement of case	9
Summary of argument	9
Applicable statutes	10
Argument	11
Appendix	21

TABLE OF CASES CITED

<i>Blair v. United States</i> , 250 U. S. 273 (1919)	13
<i>Bowles v. Baer</i> , 142 F. (2d) 787 (C. C. A. 7th, 1944) ..	14
<i>Ellis v. Interstate Commerce Commission</i> , 237 U. S. 434 (1915)	13
<i>Edicott Johnson Corporation v. Perkins</i> , 317 U. S. 501 (1943)	14, 15
<i>McGarry v. Securities and Exchange Commission</i> , 147 F. (2d) 389 (C. C. A. 10th, 1945)	13
<i>Myers v. Bethlehem Shipbuilding Corporation</i> , 303 U. S. 41 (1938)	14
<i>Nelson v. United States</i> , 201 U. S. 93 (1906)	13, 14
<i>Oklahoma Press Publishing Company v. Walling</i> , — U. S. —, 90 L. Ed. 452 (1946)	12, 15
<i>Silverstone Lumber Co. v. United States</i> , 251 U. S. 385 (1920)	15

STATUTES

Act of Cong., May 27, 1933, c. 38, Title I (Securities Act), Sections 17(a), 19(b), 20(a) and 22(b), 48 Stat. 84, 15 U. S. C. 77 q (a), 77 s (b), 77 t (a) and 77 v (b):	
Section 17 (a)	21
Section 19 (b)	21

	Page
Section 20 (a)	21
Section 22 (b)	22
Act of Cong., June 6, 1934, c. 404 (Securities Exchange Act) Sections 10 (b), 21 (a), 21 (b) and 21 (c), 48 Stat. 899, 15 U. S. C. 78 j (b), 78 u (a), 78 u (b) and 78 u (c):	
Section 10 (b)	23
Section 21 (a)	23
Section 21 (b)	23
Section 21 (c)	23
Rule X-10B-5 issued under Section 10(b) of the Securities Exchange Act	11
Section 240 of the Judicial Code as amended, Title 28, U. S. Code, Sec. 347 (a)	6
United States Constitution, Amendment IV	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 789

VACUUM CAN COMPANY, A CORPORATION,
BURTON O. SMITH,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

The Petitioners Vacuum Can Company, a corporation, and Burton O. Smith, President of Vacuum Can Company, respectfully pray for a Writ of Certiorari to review the decision (R. 35-39) and judgment (R. 39) of the United States Circuit Court of Appeals for the Seventh Circuit entered on September 16, 1946 affirming the order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on June 14, 1946 (R. 28) requiring petitioners to produce before an officer of Respondent certain books and records of Petitioner, Vacuum Can Company.

Summary Statement

In August, 1945 it came to the attention of the Securities and Exchange Commission that one Marie Mayer in September, 1944, and while an employee of Mutual Benefit Health and Accident Association, sold fifty (50) certain shares of stock of Vacuum Can Company, a corporation, to her employer and close acquaintance, one Orris J. Pothast, General Agent for said Mutual Benefit Health and Accident Association, at a price of \$90.00 a share (R. 13-14). There were facts disclosed which tended to show according to an Order Directing Investigation and Designating Officers to Take Testimony issued by the Commission (R. 9), that in "making the above sale of securities Marie Mayer failed to disclose that such stock had been purchased only six (6) days previously for \$10.00 and she also falsely represented that:

"1. Vacuum Can Company was about to split its stock so that each stockholder would have ten new shares for each old share held;

"2. The Company would pay a \$10.00 dividend on each new share after the new shares were issued."

It is shown by the affidavit of Alec J. Keller, an attorney for the Commission (R. 13-16) that Marie Mayer's alleged false representations actually were that Burton O. Smith, President of Vacuum Can Company, had informed her the stock would soon be split on this basis and a dividend of \$10.00 a share paid.

Because of the aforesaid facts, the Commission deemed it "necessary and appropriate" that an investigation be made "to determine whether Marie Mayer had" engaged in the acts above set forth or any acts of similar object (R. 6). Purportedly to aid in this determination the Securities and Exchange Commission on November 30, 1945 issued a

subpoena to the Vacuum Can Company, and one in identical form to Burton O. Smith, President of the Vacuum Can Company, requiring production before an officer of the Commission of the following books, papers and documents (R. 8, 9):

1. Stock Certificate Book including stubs and cancelled stock certificates of Vacuum Can Company for the period from July 1, 1942 to November 29, 1945, both inclusive.

2. The stock ledger or stock ledgers of Vacuum Can Company for the period from July 1, 1942 to November 29, 1945, both inclusive.

3. All letters, telegrams, memoranda, communications and correspondence, or correct copies thereof, received by Vacuum Can Company, Burton O. Smith, president of Vacuum Can Company, and all officers, directors, agents and other representatives of the Vacuum Can Company during the period from July 1, 1942 to November 29, 1945, both inclusive, from the following named persons:

Marie Mayer
A. E. Blakesley
E. J. Woodruff
W. D. Woodruff
Dudley F. Baker
Ed. Reiss
S. L. Reece
E. C. Rees
Rose C. Fynn
Orris J. Pothast
G. A. Gustafson

4. Carbons or duplicate original copies of all letters, telegrams, memoranda, correspondence and communications, or correct copies thereof, mailed, transmitted or delivered by Vacuum Can Company, Burton O. Smith, president of Vacuum Can Company, and all officers, directors, agents and other representatives of the

Vacuum Can Company during the period from July 1, 1942 to November 29, 1945, to the following named persons:

Marie Mayer
A. E. Blakesley
E. J. Woodruff
W. D. Woodruff
Dudley F. Baker
Ed. Reiss
S. L. Reece
E. C. Rees
Rose C. Fynn
Orris J. Pothast
G. A. Gustafson

Pursuant to said subpoenas, the Vacuum Can Company and Burton O. Smith produced all letters, telegrams, memoranda, communications and correspondence called for by paragraphs 3 and 4 of said subpoenas (R. 18-19) and brought before the designated officer of the Securities and Exchange Commission and offered to produce and exhibit all books and records called for in paragraphs 1 and 2 of said subpoenas as they applied to or affected all or any persons named in said subpoenas (R. 19), that is, all parts thereof or documents which showed the names of any of such persons (R. 25).

The Securities and Exchange Commission applied to the District Court for the Northern District of Illinois, Eastern Division, for an order compelling production of all books and records called for by paragraphs 1 and 2 of said subpoenas on February 5, 1946 (R. 1). An order to show cause was entered on said February 5, 1946 (R. 16).

As to the alleged representations of Marie Mayer (*i. e.* that Burton O. Smith had informed her the stock would be split and dividends paid) an affidavit of Burton O. Smith showed at no time did he inform Marie Mayer or state to anyone else that the stock of Vacuum Can Company would

be split on the basis of ten new shares for one old share and a dividend of \$10.00 a share paid on each new share (R. 23). It further appears that Burton O. Smith had so informed Orris J. Pothast upon inquiry several months prior to August, 1945 that there would be no such split or dividend (R. 15).

The record also affirmatively showed that Orris J. Pothast had been able to and did purchase through Otis & Company ten shares of stock of Vacuum Can Company prior to the sale to him by Marie Mayer, at \$12.25 a share (R. 14). Pothast had told Marie Mayer of this purchase but she had informed him that he was lucky to acquire this stock and would not be able to acquire any more in that fashion (R. 14); but subsequently and between December, 1944 and April, 1945, Mr. Pothast was able to and did purchase three additional blocks of stock of Vacuum Can Company through an open order with Otis & Company totalling 125 shares at prices between \$16.00 and \$17.00 a share (R. 14, 15). The fifty shares of stock sold to Orris J. Pothast by Marie Mayer by means of the alleged false concealment and false representations were represented by two certificates for twenty-five (25) shares each which had been issued by Vacuum Can Company in the name of Rose Finn and before that ("in the twenties") in the name of the deceased husband of Rose Finn and that they were forwarded to Vacuum Can Company by a Mr. Blakesley for transfer from the name of Rose Finn to the name of Orris J. Pothast resulting in the issuance of Certificate No. 1171 in the name of Orris J. Pothast (R. 25). Burton O. Smith knew nothing about the transaction between Marie Mayer and Orris J. Pothast until the certificates standing in the name of Rose Finn were forwarded by said Blakesley to be transferred on the books of the Corporation to Orris J. Pothast (R. 23).

In addition to questioning the relevancy, materiality and reasonableness of the demand Vacuum Can Company and Burton O. Smith further submitted affidavits showing that the Securities and Exchange Commission had questioned one Leroy H. Miller, a stockholder of Vacuum Can Company, in a manner which indicated to him that the Securities and Exchange Commission was attempting to create the impression that misrepresentations were made generally to purchasers of its stock by Vacuum Can Company (R. 26-7), that such impression was being conveyed by newspaper accounts (R. 28) and that Burton O. Smith feared the disturbing effect of such questioning of stockholders at random upon the company-stockholder relations (R. 23). There is nothing in the record intimating that the alleged fraudulent sale by Marie Mayer involved Vacuum Can Company or Burton O. Smith in any way in her fraudulent scheme. There is no intimation therein of any other fraudulent sale by Marie Mayer or anyone else of Vacuum Can Company stock or other corporate stock.

Despite the above facts on June 14, 1946 an order was entered by said Court requiring Vacuum Can Company and Burton O. Smith to produce said books and records on June 24, 1946.

Respondents, Vacuum Can Company and Burton O. Smith, filed a Notice of Appeal on June 21, 1946 (R. 30) to the United States Circuit Court of Appeals for the Seventh Circuit. The Securities and Exchange Commission filed a Motion to Dismiss Appeal or Affirm on August 12, 1946 (R. 34). On September 16, 1946 said appeal was dismissed by the said Circuit Court of Appeals (R. 39).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, Title 28, U. S. Code, Sec. 347(a).

Questions Presented

Whether the Securities and Exchange Commission in an investigation under Section 20(a) of the Securities Act (15 U. S. C. 77 t(a)) and Section 21 (a) of the Securities Exchange Act (15 U. S. C. 78 u(a)) of a sale of 50 shares of stock from one individual to another, allegedly by false pretenses, which sale in no way involved the corporation which originally issued the stock, may require production by the corporation or its officers of books and records of the corporation which are not relevant to the investigation.

Whether in such an investigation the Securities and Exchange Commission may require production by the corporation or its officers of books and records in no way material to such investigation if produced, particularly where the facts as to all the alleged false pretenses are already clearly shown in the record and could not conceivably be shown by the particular corporate books demanded.

Whether a corporation and its officers are entitled to the protection of the Fourth Amendment of the Constitution of the United States against unreasonable searches and seizures of corporate books and records under the pretense that such records are needed in connection with an investigation of a sale of 50 shares of stock of such corporation with which sale the corporation had no connection, when actually such books and records obviously would be of no assistance in the investigation, or no more than the books of any other corporation, but their production would cause damage and embarrassment to the corporation.

Whether the Securities and Exchange Commission may use an investigation purported to be of the actions of an individual in making one sale to a friend or acquaintance, allegedly by false pretenses, of 50 shares of stock of a particular corporation, where the shares had been long issued and outstanding and no connection was shown be-

tween the individual and the corporation, as basis or excuse to obtain by legal process the stock certificate book and stock ledger of the corporation and to thereupon conduct a questioning at random of the corporate stockholders.

Reasons for Granting Writ

Important questions of Federal law and Federal constitutional law have been decided in a way which, it is submitted, is untenable; and such important questions, involving the investigative powers of an administrative agency of the United States and the protection of corporate books and records of disinterested third parties from unreasonable searches and seizures by administrative agencies under the Fourth Amendment to the Constitution of the United States, have not been but should be settled by this Court.

BRIEF IN SUPPORT OF PETITION

The Opinions Below

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division entered on October 30, 1946 *nunc pro tunc* as of June 14, 1946 (R. 39-45) is not yet reported.

The opinion of the United States Court of Appeals dated September 16, 1946 (No. 9144, Oct. Term, 1945, April Session, 1946) (R. 35-39) is not yet reported.

Statement of Case

The facts are set forth in the "Summary" above.

Summary of Argument

I. It is a violation of the Fourth Amendment of the Constitution of the United States to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission to compel production of the private corporate books and records of a disinterested third party in aid of an investigation of an alleged violation of Section 17 (a) of the Securities Act and Section 10 (b) of the Securities Exchange Act when the books and papers thereby sought are not relevant to the subject investigated or when their requirement is excessive for the purposes of the inquiry.

II. The books and records which the petitioners herein have refused to deliver are, on the face of the record, plainly irrelevant to the subject of the investigation.

III. The production of the books and records in question obviously would not be needed or useful to the purported subject of inquiry and their production would cause serious damage to the petitioners; consequently the requirement of their production is excessive.

IV. It would be unreasonable and in violation of the Fourth Amendment to the Constitution and against public policy to permit an administrative agency to seize private books and records on the pretense of their necessity to a specific inquiry when their uselessness and excessiveness in such inquiry, apparent on the record, and the insignificant subject of inquiry itself points to an ulterior motive in demanding the books and a desire to commence a fishing expedition.

Applicable Statutes

The investigation is of possible violation of Section 17 (a) of the Securities Act (Act of Cong. May 27, 1933, c. 38, Title I, 48 Stat. 84), 15 U. S. C. 77 q (a), and Rule X-10B-5 issued under Section 10 (b) of the Securities Exchange Act (Act of Cong., June 6, 1934, c. 404, 48 Stat. 899), 15 U. S. C. 78 j(b).

The power of the Securities and Exchange Commission to investigate is given by Section 20 (a) of the Securities Act, 15 U. S. C. 77 t (a), and Section 21 (a) of the Securities Exchange Act, 15 U. S. C. 78 u (a).

The right of the Securities and Exchange Commission to issue subpoenas is given by Section 19 (b) of the Securities Act, 15 U. S. C. 77 s (b), and Section 21 (b) of the Securities Exchange Act, 15 U. S. C. 78 u (b).

The right of and necessity for the Securities and Exchange Commission to apply to a District Court for enforcement of its subpoenas are found in Section 22 (b) of the Securities Act, 15 U. S. C. 77 v (b) and Section 21 (c) of the Securities Exchange Act, 15 U. S. C. 78 u (c).

All of the above sections of said statutes (Act of Cong., May 27, 1933, c. 38, Title I, 48 Stat. 84; Act of Cong., June 6, 1934, c. 404, 48 Stat. 899) and said rule are printed in the Appendix hereto for the convenience of the Court.

ARGUMENT

I. It is a violation of the Fourth Amendment to the Constitution to enforce a subpoena duces tecum issued by the Securities and Exchange Commission to compel production of the private corporate books and records of a disinterested third party in aid of an investigation of an alleged violation of Section 17 (a) of the Securities Act and Section 10 (b) of the Securities Exchange Act when the books and papers thereby sought are not relevant to the subject investigated or when their requirement is excessive for the purposes of the inquiry.

The Petitioners do not question the jurisdiction of the Securities and Exchange Commission to investigate (under authority of Section 20 (a) of the Securities Act, 15 U. S. C. 77 t (a) and Section 21 (a) of the Securities and Exchange Act, 15 U. S. C. 78 u (a)) the facts and circumstances with respect to the sale of certain stock by Marie Mayer, allegedly by false pretences, as indicated in the Order Directing Investigation and Designating Officers to Take Testimony issued by the Commission, to determine whether or not said Marie Mayer violated Section 17 (a) of the Securities Act, 15 U. S. C. 77 q (a) and Rule X-10B-5 under Section 10 (b) of the Securities and Exchange Act, 15 U. S. C. 78 j (b).

Nor do the Petitioners question the right of the Securities and Exchange Commission to subpoena books and records in aid of such investigation when the books and records are relevant and material to the subject investigated. (Securities Act, Section 19 (b), 15 U. S. C. 77 s (b), Securities and Exchange Act, Section 21 (b), 15 U. S. C. 78 u (b)). Further the Petitioners do not contend that the right of this Securities and Exchange Commission to subpoena books and documents should be narrowly limited.

The question of protection under the Fifth Amendment is not involved in any way.

It is submitted however that it is plainly in excess of the statutory authority granted and plainly a violation of the Fourth Amendment to require from a disinterested third party private books and records factually irrelevant to the subject of the inquiry or when their requirement is excessive for the purposes of the inquiry.

When irrelevant books and records are subpoenaed it violates the requirement of "probable cause" of the Fourth Amendment. If the demand for documents is excessive, as distinct from adequate, for the purposes of the inquiry the subpoena violates the requirement of reasonableness in the Fourth Amendment; particularly this would be so if the production would be burdensome to the disinterested party. The Petitioners' position in this regard is in accord with the analysis of the Fourth Amendment in *Oklahoma Press Publishing Company v. Walling*, — U. S. —, 90 L. Ed. 452 (1946) as follows:

"The requirement of 'probable cause' * * * is satisfied, * * * by the Court's determination that * * * the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, * * *, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry."

Further in speaking of the applicability of the Fourth Amendment to corporate books and records the Court in *Oklahoma Press* case stated that it was applicable only against abuse by way of too much indefiniteness or breadth, "if also the inquiry is one a demanding agency is authorized by law to make and *the materials specified are relevant.*" (Italic ours.)

With regard to a disinterested third party the requirements of the Fourth Amendment seem to be identical

except of course the disinterestedness of and the probable damage or burden on such third party should be given consideration in connection with the excessiveness or reasonableness of the demand. The rights of a third party in this connection are well expressed in *McGarry v. Securities and Exchange Commission*, 147 F. (2d) 389 (C.C.A. 10th 1935) where the Court stated:

“The fact that the order instituting the investigation did not indicate that the Bank had violated or was suspected of violating any provision of the Act is not material. The question is whether the books and records of the Bank sought by the subpoena called for matter relevant and pertinent to the inquiry. The authority of the Commission to require the production of books and papers embraces not only relevant books and papers of the party or corporation under investigation, but also those of third parties or corporations.” (p. 392)

“The test of the validity of the subpoena is not the extent of the books and records called for, but whether those called for are pertinent and relevant to the inquiry.” (p. 392)

The fact that a stranger to the inquiry is entitled to particular consideration is indicated by *Ellis v. Interstate Commerce Commission*, 237 U. S. 434 (1915) where Justice Holmes speaking for the Court stated:

“The appellant’s refusal to answer the series of questions put was not based upon any objection to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour Car Lines,—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the powers of the Commission.” (pp. 444-5)

It is submitted that intimations in certain cases (see *Blair v. United States*, 250 U. S. 273, 282 (1919); *Nelson v.*

United States, 201 U. S. 93, 115 (1906) cited by Respondent below) that a disinterested third party has no standing to question the relevancy of his own private papers which are demanded in an administrative proceeding should be clarified as not applicable when such papers are factually irrelevant to the purpose of the inquiry. If these intimations expressed the law any private papers regardless of subject could be seized without recourse on the pretext that they were to be used in an investigation of another person. These cases would properly seem to have reference to the tendency or effect of the testimony on the issues as legally objectionable because of incompetency or immateriality; we are merely concerned with the *factual* irrelevancy of the documents sought to the subject of inquiry and the excessiveness of their requirement. On this basis the rights of third parties—strangers, should be more carefully protected than the rights of parties. *Ellis v. Interstate Commerce Commission*, *supra*. Cf. *McGarry v. Securities and Exchange*, *supra*.

It is further submitted that the holdings below (see particularly the District Court's opinion at R. 45 and compare the Statement of the Seventh Circuit Court of Appeals in *Bowles v. Baer*, 142 F. (2d) 787, 789, C. C. A. 7th, 1944) that an administrative agency's decision as to what is relevant is binding upon the court and that the court's function in enforcing an administrative subpoena is purely ministerial, should be thoroughly discredited. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49 (1938) recognizes the right to make appropriate defense to a demand by administrative subpoena. In conditioning enforcement of subpoenas upon application to a district court, Congress obviously intended the court to keep the enforcement of subpoenas within constitutional limits. The government did not contend otherwise in *Endicott Johnson Corpora-*

tion v. Perkins, 317 U. S. 501 (1943). See dissent p. 512. The Supreme Court so assumed in *Oklahoma Press Publishing Co. v. Walling*, *supra*, p. 454, note 57.

The opinion of the Circuit Court of Appeals below appears to state that the Petitioners are not entitled to protection of the Fourth Amendment because only corporate records are involved (R. 38). There would seem to be no justification for this holding on the basis of the *Oklahoma Press Publishing case*, *supra*, (see note 35) or otherwise. Cf. *Silverstone Lumber Co. v. United States*, 251 U. S. 385 (1920).

II. The books and records which the petitioners herein have refused to deliver are on the face of the record plainly irrelevant to the subject of the investigation.

The purpose of the investigation and order entered therein, in the words of the Seventh Circuit Court of Appeals (R. 35), was "to determine whether one Marie Mayer had violated anti-fraud sections of the Federal securities laws, * * * by selling stock of * * * Vacuum can Company, in interstate commerce * * * by means of false representations and fraudulent concealment of material facts." The order entered herein by the Commission and the affidavits filed by the Commission showed that the alleged false representations of Marie Mayer were that the Vacuum Can Company was about to split its stock and pay a dividend of \$10.00 on the new shares, or that the president of Vacuum Can Company had so informed her, and the false concealment, that she failed to disclose that such stock had been purchased for \$10.00 a share only six days before (R. 5, 13-16).

The books and records sought were the stock certificate book, including stubs and cancelled stock certificates, and

the stock ledger of Vacuum Can Company for the period from July 1, 1942 to November 29, 1945 (R. 8, 9).

No facts concerning the two alleged misrepresentations or the alleged concealment were matters of corporate record. Certainly they are not a matter which could be indicated by stock certificate book including stubs and cancelled stock certificates or by the stock ledger. It is inconceivable that such stock certificate books, stubs, certificates or stock ledgers could have the remotest connection with or throw any light upon the truth or falsity of Marie Mayer's alleged misrepresentations with regard to splitting of stock or dividends or what the president of the corporation had informed her of the splitting of the stock or payment of dividends or with respect to what price the stock of the Vacuum Can Company had been sold prior to the sale by Marie Mayer to Orris J. Pothast. It is presumed that the Court will take judicial notice of what type of information is contained in stock certificate books, certificates, stubs and stock ledgers.

It further appears affirmatively from the affidavit of Petitioner Burton O. Smith, president of Vacuum Can Company that he had not informed Marie Mayer or anyone else of any split of stock or payment of dividends (R. 23). On the contrary it appears that before this investigation was commenced he had informed Orris J. Pothast that Marie Mayer's alleged statements were false (R. 15). Therefore, not only would the books sought throw no light whatever on any misrepresentations alleged to have been made but the record shows that the falsity of the alleged representations was already clearly established.

With respect to the surrounding circumstances and the incidental statements by Marie Mayer mentioned in the affidavit of Alec J. Keller (R. 13-16), the history of the particular certificates of stock sold by Marie Mayer to

Orris J. Pothast as shown by the corporate books is already in the record (R. 25); so also the fact that from the time immediately prior to the sale by Marie Mayer to Orris J. Pothast until April, 1945 Pothast had been able to and did purchase four other blocks of the stock of Vacuum Can Company totaling 135 shares at prices from \$12.25 to \$17.00, by the simple means of an open order at a brokerage house (R. 14-15).

And it should be remembered, of course, that the Petitioners have tendered all portions of the books and records demanded which relate or refer to Marie Mayer or any other specific individual named by the Securities and Exchange Commission (R. 19, 20, 25) and the only parts of the books in question are those which do not refer to Marie Mayer, Pothast or any other individual who can be named by the Securities and Exchange Commission.

III. The production of the books and records in question obviously would not be needed or useful to the purported subject of inquiry and their production would cause serious damage to the petitioners; consequently the requirement of their production is excessive.

With the means shown in the record, then of disproving the truth of all of the alleged representations of Marie Mayer and it being self evident that such part of the stock certificate book, stubs and certificates of stock ledger of Vacuum Can Company which does not refer to Marie Mayer or any individual who can be named by the Securities and Exchange Commission could not conceivably throw any light upon whether Marie Mayer sold securities by means of said false representations, it is plain that not only would such demanded books and records be irrelevant to the inquiry but their requirement would be excessive and unreasonable.

This requirement would seem peculiarly excessive and unreasonable in view of the possible, indeed probable, damage and embarrassment to the corporate Petitioner. From a practical standpoint it seems obvious that the Securities and Exchange Commission must intend to question each stockholder of Vacuum Can Company (1942-1945) as to whether he bought his stock because of false representations. There would be no other disposition to make of a complete list of stockholders all unknown to the Commission. And the questioning by the Commission of Leroy H. Miller shown by Miller's affidavit would bear this out (R. 26-7). Burton O. Smith, president of Vacuum Can Company, very properly fears the result on stockholder-company relations of such random questioning (R. 23). Already the Vacuum Can Company has suffered unwarranted adverse publicity (R. 28). With nothing in the record to indicate any connection of the Vacuum Can Company with the alleged fraudulent sale or that there was any other fraudulent sale of Vacuum Can Company stock it is no more proper to subject that company to a random questioning of its stockholders than to require the like disclosure of its stock list by any other, or every, American corporation on the theory that Marie Mayer may have sold their stock by false misrepresentations.

It is estimated that the requirement of irrelevant books purportedly to prove facts already established to the detriment and embarrassment of a disinterested third party is outrageously excessive, unreasonable and therefore unconstitutional.

IV. It would be unreasonable and in violation of the fourth amendment to the Constitution and against public policy to permit an administrative agency to seize private books and records on the pretense of their necessity to a specific inquiry when their uselessness and excessiveness in such inquiry, apparent on the record, and the insignificant subject of inquiry itself points to an ulterior motive in demanding the books and a desire to commence a fishing expedition.

The attention of the Court is directed to the fact that not only are the books in question irrelevant and their requirement excessive, and burdensome to corporate petitioners but the purported subject of the inquiry itself is insignificant. It involves only the private sale of 50 shares of long outstanding stock by a woman to her employer and close acquaintance. Without questioning the jurisdiction of the Securities and Exchange Commission, it would seem that the Securities and Securities Exchange Acts were not designed to detect and bring to punishment fraud in such an isolated sale of stock issued long before their passage (R. 24-25); for State laws and procedure are ample and effective for this purpose. When such an insignificant matter is seized upon as a basis for an all-embracing subpoena to examine the stock record books of the corporation which issued the stock, an ulterior motive would seem apparent—either a matter which has not been disclosed or the “hope that something would turn up” condemned by Justice Holmes. In either event the Courts should not lend their aid.

Conclusion

Wherefore, the Petitioners respectfully pray the granting of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

December 9, 1946.

CHRISTOPHER B. GARNETT,
Counsel for Petitioners.

BARBOUR, GARNETT, PICKETT,
KEITH & GLASSIE,
HENRY H. GLASSIE, JR.,
THOMAS H. RILEY,
EVERETT JENNINGS,
Of Counsel.

APPENDIX

Applicable Statutes

Section 17 (a) of the Securities Act, (15 USC 77 q (a))

Sec. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud,
or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 20 (a) of the Securities Act, (15 USC 77 t (a))

Sec. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Section 19 (b) of the Securities Act (15 USC 77 a (b))

19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this Title, any member of the Commission or any officer or officers designated by it are em-

powered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Section 22 (b) of the Securities Act, (15 USC 77 v (b))

22. (b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Rule X-10B-5 issued under Section 10(b) of the Securities Exchange Act, (15 USC 78 j (b))

Rule X-10B-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (1) to employ any device, scheme, or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Section 10 (b) of the Securities Exchange Act, (15 USC 78 j (b))

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • • • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 21 (a), (b) and (c) of the Securities Exchange Act, (15 USC 78 u (a), (b) and (c))

Sec. 21. (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to

administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes involved.....	2
Statement.....	2
Argument.....	6
Conclusion.....	14
Appendix.....	15

CITATIONS

Cases:

<i>Blair v. United States</i> , 250 U. S. 273.....	10
<i>Bowles v. Baer</i> , 142 F. 2d 787.....	6
<i>Endicott Johnson Corporation v. Perkins</i> , 317 U. S. 501.....	6, 8
<i>Interstate Commerce Commission v. Brimson</i> , 154 U. S. 447.....	10, 11
<i>McGarry v. Securities and Exchange Commission</i> , 147 F. 2d 389.....	11
<i>McMann v. Securities and Exchange Commission</i> , 87 F. 2d 377, certiorari denied, 301 U. S. 684.....	11
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U. S. 41.....	10
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U. S. 186.....	6, 8, 9, 10, 13
<i>Penfield Company of California v. Securities and Exchange Commission</i> , 143 F. 2d 746, certiorari denied, 323 U. S. 768.....	9
<i>Perkins v. Endicott Johnson Corporation</i> , 128 F. 2d 208, affirmed, 317 U. S. 501.....	9
<i>Wilson v. United States</i> , 221 U. S. 361.....	10, 11

Statutes:

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a et seq.):	
Section 19 (b).....	11, 15
Section 20 (a).....	15
Section 22 (b).....	5, 11, 15
Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78a et seq.):	
Section 21 (a).....	16
Section 21 (b).....	11, 17
Section 21 (c).....	5, 11, 17

Miscellaneous:

Wigmore, <i>Evidence</i> (3d ed. 1940), Vol. 8, §§ 2192, 2193....	10
---	----

INDEX

1. *...*
2. *...*
3. *...*
4. *...*
5. *...*
6. *...*
7. *...*
8. *...*
9. *...*
10. *...*
11. *...*
12. *...*
13. *...*
14. *...*
15. *...*
16. *...*
17. *...*
18. *...*
19. *...*
20. *...*
21. *...*
22. *...*
23. *...*
24. *...*
25. *...*
26. *...*
27. *...*
28. *...*
29. *...*
30. *...*
31. *...*
32. *...*
33. *...*
34. *...*
35. *...*
36. *...*
37. *...*
38. *...*
39. *...*
40. *...*
41. *...*
42. *...*
43. *...*
44. *...*
45. *...*
46. *...*
47. *...*
48. *...*
49. *...*
50. *...*
51. *...*
52. *...*
53. *...*
54. *...*
55. *...*
56. *...*
57. *...*
58. *...*
59. *...*
60. *...*
61. *...*
62. *...*
63. *...*
64. *...*
65. *...*
66. *...*
67. *...*
68. *...*
69. *...*
70. *...*
71. *...*
72. *...*
73. *...*
74. *...*
75. *...*
76. *...*
77. *...*
78. *...*
79. *...*
80. *...*
81. *...*
82. *...*
83. *...*
84. *...*
85. *...*
86. *...*
87. *...*
88. *...*
89. *...*
90. *...*
91. *...*
92. *...*
93. *...*
94. *...*
95. *...*
96. *...*
97. *...*
98. *...*
99. *...*
100. *...*

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 789

**VACUUM CAN COMPANY, A CORPORATION, AND
BURTON O. SMITH, PETITIONERS**

v.

SECURITIES AND EXCHANGE COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The memorandum opinion of the district court (R. 39-45) is not reported. The opinion of the circuit court of appeals (R. 35-39) is reported at 157 F. 2d 530.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 16, 1946 (R. 39). The petition for a writ of certiorari was filed on December 16, 1946. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. 77v (a)) and Section 27 of the Securities Exchange Act of 1934 (15 U. S. C. 78aa).

QUESTIONS PRESENTED

1. Whether both courts below correctly held that the corporate books in question were not irrelevant to the Commission's inquiry.

2. Whether, in view of the definite and limited scope of the subpoena involved, there is here any violation of the Fourth Amendment.

STATUTES INVOLVED

The applicable provisions of the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a *et seq.*) and the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78a *et seq.*) are set forth in the Appendix, *infra*, pp. 15 *et seq.*

STATEMENT

On October 12, 1945, the Commission, by order (R. 5), instituted an investigation to determine whether one Marie Mayer had engaged in a scheme to defraud in the sale of stock of petitioner, Vacuum Can Company, in violation of the federal securities laws. Information reported to the Commission indicated that in September, 1944, Mayer in selling stock of Vacuum Can at

\$90 per share falsely represented that Vacuum Can was about to split its stock and pay a \$10 dividend on the new shares and also failed to disclose that such stock had been purchased for \$10 per share only six days before (R. 6). The order declared it to be the purpose of the inquiry to investigate these facts and "any acts and practices of similar purport or object" (R. 6).

One Orris J. Pothast, general agent for an insurance company, stated that Marie Mayer sold him 50 shares of Vacuum Can stock in September, 1944, at \$90 per share (R. 14); that he was induced to make the purchase by her statements that she held \$70,000 of stock in Vacuum Can, that, as petitioner Smith, president of Vacuum Can, had informed her, the stock would soon be split on the basis of ten new shares for one old share and a dividend of \$10 would be paid on each new share, and that the stock was closely held and practically impossible to obtain (R. 14).¹ Pothast also stated that he later ascertained from petitioner Smith that the corporation had no

¹ Pothast was induced to make this purchase at \$90 per share, despite the fact that six days earlier he had purchased 10 shares at \$12.25 per share, by her statements that his 10-share purchase was from an estate in liquidation and that she was sure he could not get additional stock in that way. That the latter statement was probably misleading appears from the fact that he was able to acquire, during the following six months, a total of 125 shares at prices of \$16 and \$17 per share (R. 14-15).

such plans regarding splitting of the stock, or payment of a dividend thereon (R. 15).²

In order to determine whether, in connection with this and other transactions of similar purport or object, a scheme to defraud had been devised, it was important to ascertain the facts with respect to Mayer's indicated misrepresentations and whether she had sold Vacuum Can stock to others by means of these or similar misrepresentations.³ Sources of information with respect to such representations included the stock books and stock ledgers of the company and certain correspondence between the company and Mayer, Pothast and others.⁴ Consequently, on November 30, 1945, subpoenas *duces tecum* were duly directed to petitioners (R. 8-11), requiring them to appear and produce certain books and records of Vacuum Can covering the period

² The transaction between Mayer and Pothast was rescinded on October 26, 1945, after the Commission's investigation had commenced. Pothast received a check for \$4,500 made payable to and endorsed by Mayer's attorney, and Pothast endorsed his stock certificate for 50 shares in blank and delivered it to the attorney (R. 15).

³ Pothast's affidavit states among other things that on February 6, 1946, Mayer asked him to sign an affidavit in order to "relieve her 'over at the Securities and Exchange;'" that he refused to sign because of the statement therein that she did not recommend or offer to sell Vacuum Can stock to him; and that she said the affidavit had been prepared for his signature by petitioner Smith (R. 22).

⁴ Mayer had refused to testify before a Commission officer concerning her transactions in Vacuum Can stock, claiming her privilege against self-incrimination (R. 16).

from July 1, 1942, to the date of the subpoenas, viz., its stock certificate book including stubs and cancelled stock certificates, stock ledgers, and correspondence between the company and eleven named persons including Mayer and Pothast. Petitioners produced the correspondence but refused to produce the stock certificate book and ledgers described in the subpoenas. Instead, they sought to govern the scope of the Commission's inquiry by tendering only those portions of the books which specifically referred to Mayer, Pothast and the other persons named in the subpoenas. (R. 3-4, 25.)

On February 5, 1946, the Commission applied to the district court for enforcement of the subpoenas with respect to Vacuum Can's stock certificate book and ledgers, pursuant to Section 22 (b) of the Securities Act and Section 21 (c) of the Securities Exchange Act, Appendix, *infra*, pp. 15 *et seq* (R. 1-5). The district court, after hearing, determined that the records were not plainly irrelevant to the investigation, upheld the reasonableness of the subpoenas, and granted the Commission's application, specifically ordering petitioners to produce the stock certificate book and ledgers described in the subpoenas (R. 28-29). The circuit court of appeals, on motion of the Commission, dismissed petitioners' appeal from the district court order (R. 39) on the ground that "the appeal is so clearly without

merit that we think it apparent that it was taken for delay only * * * (R. 39).

ARGUMENT

1. The gist of petitioners' argument is that the books and records of Vacuum Can required to be produced by the order of the district court are not relevant to the Commission's investigation (Pet. 11-15). This argument has no merit. At the outset, it should be noted that petitioners concede the controlling authority of decisions of this Court which uphold the right of an administrative agency to enforcement of its subpoenas upon a showing merely that the evidence sought is "not plainly incompetent or irrelevant to any lawful purpose" of the agency in the discharge of its duties under the Act. See *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186.⁵ Petitioners also concede that such right should not be "narrowly limited" (Pet. 11).

⁵ Petitioners misconstrue the rulings below and the opinion in *Bowles v. Baer*, 142 F. 2d 787, 789 (C. C. A. 7), as holding that the district court's function in enforcing an administrative subpoena is "purely ministerial," in consequence of which they ask that these rulings should be "discredited" (Pet. 14). Actually, however, the district court below simply followed the rule enunciated by this Court in *Endicott Johnson v. Perkins*, 317 U. S. 501 (R. 43). The district court states, "Under the statute the Commission has a right to request any evidence which is not plainly irrelevant to the investigation being conducted by it," and declared its belief that the record showed the Commission's demand for the corporate records to be reasonable (R. 45). The *Bowles* case merely holds

As the court below held (R. 37), the evidence sought by the Commission is relevant to a lawful inquiry, namely, a determination whether there have been violations by Marie Mayer of the federal securities laws in the sale of securities of petitioner, Vacuum Can, and "any acts and practices of similar purport or object" (R. 6). Under the Commission's order for investigation, it was clearly pertinent to inquire into not only the allegedly false representations and fraudulent concealment of material facts set forth in the order which relate to Mayer's sale to Pothast, but also any other representations alleged to have been made by her to Pothast, e. g., that she held \$70,000 worth of Vacuum Can stock and that the stock of the company was closely held. Obviously the stock books in question were relevant to an inquiry into the truth or falsity of such statements. Further, the investigative order makes relevant any purchases or sales of Vacuum Can stock which Mayer may have transacted with persons other than Pothast, and the stock books would be a prime source of information with respect to such transactions.

Petitioners' offer to produce only that portion of the stock record books of Vacuum Can which

that the district court, in the absence of any regulative statutory provision, cannot control the "*manner* in which the investigation was to be conducted" (*italics supplied*), and that therefore an administrative agency could exclude the public from an *ex parte* investigation, as opposed to an adversary hearing.

mentions the names of Mayer, Pothast and the others named in the subpoenas on the ground that the balance of these records are irrelevant to the inquiry, would in substance require the Commission to prove in advance of its investigation the relevancy of each page in a subpoenaed book or record. This would impose an onerous burden on the Commission and hamper, if not prevent, its investigations and defeat the purpose of the statutes. It is obvious that a limitation of the Commission's investigative scrutiny to those records which disclose the names of Mayer and the others named in the subpoenas would exclude records which, while not naming these persons, may well furnish leads to transactions involving Mayer.* Such a limitation, this Court has indicated, will not be sanctioned. See *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 213, 215-217; *Endicott Johnson Corporation v. Perkins*, 317 U. S. 501, 507-509.

2. The foregoing showing that the subpoenaed records were not plainly irrelevant to the Commission's inquiry disposes, we submit, of petitioners' contention that enforcement of the subpoenas herein would constitute an unreasonable search and seizure in violation of the Fourth Amendment because the records sought by the

* For example, it appears that Mayer was selling some stock not carried on the books in her name (R. 25-26).

Commission are irrelevant (Pet. 12).⁷ Nor is the demand for the records otherwise unreasonable within the meaning of the Fourth Amendment, as petitioners argue. The subpoenas specifically describe the books and records sought by the Commission in its investigation under the Acts and cover a limited period of time. This Court has held reasonable similar subpoenas substantially broader in scope than those in the instant case. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 210, n. 46; *Perkins v. Endicott Johnson Corporation*, 128 F. 2d 208, 210 (C. C. A. 2), affirmed, 317 U. S. 501; see *Penfield Company of California v. Securities and Exchange Commission*, 143 F. 2d 746 (C. C. A. 9), certiorari denied, 323 U. S. 768.

Petitioners' assertions respecting "detriment and embarrassment" to Vacuum Can (Pet. 18) furnish no basis for refusing the Commission enforcement of its clearly lawful investigative procedure.

⁷ Petitioners take exception to language in the opinion of the court below (R. 38) which, they assert, "appears to state that the Petitioners are not entitled to protection of the Fourth Amendment because only corporate records are involved" (Pet. 15). We cannot accept this construction of the opinion. The court below, quoting from this Court's opinion in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, makes it clear that no unreasonable search and seizure was involved in the instant case because, among other things, the subpoenaed records were relevant to the Commission's investigation (R. 37).

esses. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 217; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52.* The obligation to respond is in the public interest and arises out of the general obligation of citizenship. *Wilson v. United States*, 221 U. S. 361, 385; see *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 476; 8 Wigmore, *Evidence* (3d Ed. 1940), §§ 2192, 2193. As stated by this Court in *Blair v. United States*, 250 U. S. 273, 281:

* * * the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned * * *. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] * * * necessary to the administration of justice according to the forms and modes established in our system of government * * *

* Petitioners refer to affidavits filed by them in the district court after the close of the hearings on the Commission's application for an enforcement order as indicating that the Commission was attempting to convey the impression in an interview with a stockholder of Vacuum Can that Vacuum Can was making misrepresentations to purchasers of its stock and that such impression was also conveyed in a newspaper account (Pet. 6, 18; R. 26-28). It is apparent, however, that any inquiry made in the course of an investigation, no matter how tactfully conducted, may tend to raise questions in the mind of the person being interviewed.

Moreover, the mere fact that Vacuum Can is not itself under investigation (see Pet. 12-14) does not render the required production of its records unreasonable. *Wilson v. United States*, 221 U. S. 361, 385; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 476; *McGarry v. Securities and Exchange Commission*, 147 F. 2d 389, 392 (C. C. A. 10); *McMann v. Securities and Exchange Commission*, 87 F. 2d 377 (C. C. A. 2), certiorari denied, 301 U. S. 684; and see Sections 19 (b) and 22 (b) of the Securities Act, and Sections 21 (b) and (c) of the Securities Exchange Act, Appendix, *infra*, pp. 15 *et seq.*

Petitioners' contention that the requirement to produce Vacuum Can's records is unreasonable because only a single sale of 50 shares of stock is involved (Pet. 19), misconceives the nature and scope of the present inquiry. For example, as shown above, the purpose of the investigation embraces not only Mayer's sale to Pothast, but also any sales of Vacuum Can stock which she may have made to others in violation of the Acts. But even if the investigation were confined to an isolated sale of 50 shares of stock, there is nothing in the statutes to warrant petitioners' statement that "it would seem that the Securities and Securities Exchange Acts were not designed to detect and bring to punishment fraud in such an isolated sale of stock" (Pet. 19). On the contrary, the statutes clearly show a legislative intent to pre-

vent and deal with fraud in the sale of securities, irrespective of the size of the transaction or the number of sales involved. Indeed, petitioners concede that the Commission has jurisdiction to investigate such an "isolated" sale of stock (Pet. 11, 19).

Finally, there is no merit in petitioners' contention that no useful purpose would be served by producing the stock record books because the record made in this proceeding shows the falsity of Mayer's representations (Pet. 16-17). This amounts to a claim that the Commission may be limited to one piece of proof for each fact necessary to establish a violation. The burden of proof incident to criminal prosecutions underscores the untenability of such a position.* In any event, the statutes here involved do not contemplate that the Commissioner's investigative functions shall be limited by whatever affidavits are filed in a subpoena enforcement proceeding.

* Moreover, aside from the fact that the investigation is not confined to her sale of 50 shares to Pothast, the affidavits filed in this proceeding do not show whether the stock of Vacuum Can is closely held, or whether Mayer holds \$70,000 worth of the company's stock in the names of others. For obvious reasons the Commission should not be confined to such proof as is reflected in the affidavits submitted by the petitioners. Not only is it necessary to obtain more direct evidence to fulfill the heavy burden incident to proof of a fraudulent scheme, but verification of the statements appearing in the affidavits by examination of such original records as the stock books herein sought is necessary to guard against improvident institution of proceedings against innocent persons.

Unless the Commission is permitted to obtain sufficient evidence to prove violations of the securities laws, the statutes will necessarily have failed of their purpose. As this Court recently said in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 216:

[The Administrator's] investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited * * * by forecasts of the probable result of the investigation * * *" *Blair v. United States*, 250 U. S. 273, 282 * * *

Clearly the Commission's investigation was not prompted by a "desire to commence a fishing expedition," as petitioners suggest (Pet. 19). The information reported to the Commission tended to show, if true, that certain violations of the laws administered by the Commission had been committed by Mayer in the sale of Vacuum Can stock. Obviously, to verify the truth of this information, and to determine whether other violations of the securities laws had been committed by her and to aid in the enforcement of

the Securities Exchange Act, it is appropriate for the Commission, in furtherance of its investigation, to gain access to the stock record books of Vacuum Can.

CONCLUSION

The decision below is so clearly correct that no further review would be warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

✓ / GEORGE T. WASHINGTON,
Acting Solicitor General.

✓ ROGER S. FOSTER,
Solicitor,
Securities and Exchange Commission.

✓ ROBERT S. RUBIN,
Associate Solicitor,

✓ W. VICTOR RODIN,
Attorney.

FEBRUARY, 1947.

APPENDIX

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a, *et seq.*):

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SEC. 22. (b) In case of contumacy or refusal to obey a subpoena issued to any

person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78a *et seq.*):

SEC. 21. (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matter to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer

any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.